

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CHEM-NUCLEAR SYSTEMS, INC.	:	DETERMINATION
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1980	:	
through May 31, 1983.	:	

Petitioner, Chem-Nuclear Systems, Inc., P.O. Box 1866, Belle Vue, Washington 98009, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through May 31, 1983 (File Nos. 801549, 801582, 801909 and 802046).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 19, 1987 at 10:45 A.M., with all briefs to be submitted by August 17, 1987. Petitioner appeared by Moot & Sprague (Arnold N. Zelman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether liners purchased by petitioner outside New York State, which were subsequently used within the State, constitute tangible personal property purchased at retail and, as such, are subject to the compensating use tax imposed by Tax Law § 1110.

FINDINGS OF FACT

1. Petitioner, Chem-Nuclear Systems, Inc. (hereinafter "Chem-Nuclear"), is headquartered in Columbia, South Carolina and operates its business nationwide. Said business involves the sale of radioactive waste management services, which include consulting services and waste processing, packaging, transportation and disposal. Chem-Nuclear provides the aforesaid services primarily to nuclear utilities, however, it also performs services for other commercial

nuclear businesses and government agencies.

2. As the result of a field audit of petitioner's books and records for the period June 1, 1980 through May 31, 1983, the Audit Division issued four notices of determination and demands for payment of sales and use taxes due, as follows:

<u>Notice Number</u>	<u>Date</u>	<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
S840806455Z	8/6/84	6/1/80-5/31/81	\$ 21,327.32	\$ 8,863.41	\$ 30,190.73
S840920474Z	9/20/84	6/1/81-8/31/81	12,465.56	4,675.05	17,140.61
S841220780Z	12/20/84	9/1/81-11/30/81	21,199.11	7,846.78	29,045.89
S850320847Z	3/20/85	12/1/81-5/31/83	54,511.54	14,478.29	68,989.83
Total			<u>\$109,503.53</u>	<u>\$35,863.53</u>	<u>\$145,367.06</u>

3. Subsequent to the issuance of the four aforementioned notices, the Audit Division reduced the additional tax due from \$109,503.53 to \$78,275.22, plus minimum interest.

4. Petitioner's only customers located within the State of New York during the period at issue were Niagara Mohawk Power Corporation, Consolidated Edison of New York and the Power Authority of the State of New York. Said customers employed Chem-Nuclear to process and dispose of the nuclear waste generated by their power plants. In performing its processing and disposal services, petitioner provided, from its headquarters in South Carolina, personnel, equipment, technology and liners either on a full-time or demand basis, depending upon the customer's needs.

5. Due to certain regulatory requirements, all water must be removed from radioactive nuclear waste prior to disposal. Said waste must be in a dry or solid state for disposal. As pertinent herein, petitioner utilized the following three methods to process the radioactive waste generated by its customers' nuclear power plants:

(a) Solidification - This process involves pumping sludge-like radioactive waste into a liner where it is mixed with chemicals and cement. The cement hardens together with the radioactive waste and is permanently encased within the liner.

(b) Demineralization - This process involves pumping a liquid radioactive waste stream into liners, also known as pressure vessels. The radioactive waste is removed from the waste stream by filtration and/or ion exchange media which have been preloaded into

the liner. Thereafter, the water is removed leaving within the liner the radioactive waste, in a dry or solid form, together with the filtration and/or ion exchange media.

(c) Dewatering - The dewatering process is similar to the demineralization process except that demineralization takes place in the customer's liners. Once the filtration and/or ion exchange media contained in the customer's liners have reached full capacity, said media are pumped with water from the customer's liners into Chem-Nuclear's liners. The water is then removed leaving within Chem-Nuclear's liners the radioactive waste and the filtration and/or ion exchange media.

6. After being filled with nuclear waste, the liners at issue herein were transported by petitioner to its disposal site for burial. In some instances, the liners remained on the job site for as little as eight hours or as long as two to three months if the customer elected to store said liners for multiple shipment. Petitioner's customers were not obligated to use its transportation and burial services, as they could elect to have said services provided by other vendors. However, all three of petitioner's customers located in New York State utilized petitioner to process the nuclear waste and to transport and bury the liners in its Barnwell, South Carolina disposal site.

7. Once the radioactive waste is introduced into the liners, the inside surfaces of said liners are contaminated and, for all practical purposes, they cannot be, and are not, reused.

8. Chem-Nuclear charges its customers separately for the processing of nuclear waste and the disposal of said processed waste.

9. The entire \$78,275.22 of revised tax due represents use tax due on liners purchased by petitioner in South Carolina which were subsequently used in processing and removing the nuclear waste from Chem-Nuclear's three customers located within New York State. Of the \$78,275.22 of revised tax due, \$24,822.13 represents use tax due on liners used in the solidification process, \$42,230.11 represents use tax due on liners used in the demineralization process and \$11,222.98 represents use tax due on liners used in the dewatering process.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner maintains that the liners at issue are not subject to the compensating use tax since they were not purchased at retail as defined in Tax Law §§ 1101(b)(1) and 1101(b)(4)(i). In support of its position, petitioner argues that the liners were purchased for use in processing tangible personal property, the radioactive waste stream, and that said liners became a physical component part of the radioactive waste stream, the property upon which the services were performed. Petitioner alternatively argues that the liners, if determined not to have become a physical component part of the radioactive waste stream, were later actually transferred to its customers in conjunction with the performance of the taxable waste processing service.

11. The Audit Division asserts that the liners are an expense incurred by petitioner in performing a taxable service, that said liners do not become a physical component part of the property upon which the taxable processing services are performed and, finally, that the liners are not transferred to petitioner's customers.

CONCLUSIONS OF LAW

A. That Tax Law § 1110 imposes a compensating use tax on any tangible personal property purchased at retail which is used within the State of New York. The term "purchased at retail" is defined in Tax Law § 1101(b)(1) as:

"A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision."

As pertinent herein, Tax Law § 1101(b)(4)(i) defines retail sale as:

"A sale of tangible personal property to any person for any purpose, other than...(B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3) and (5) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax."

B. That Tax Law § 1105(c)(2) imposes a tax upon the services of:

"Producing, fabricating, processing, printing or imprinting tangible personal property, performed for a person who directly or indirectly furnishes the tangible personal property, not purchased by him for resale, upon which such services are performed."

C. That Tax Law § 1105(c)(5), in pertinent part, imposes a tax upon the services of:

"Maintaining, servicing or repairing real property, property or land..., whether the services are performed in or outside of a building..., but excluding interior cleaning and maintenance services performed on a regular contractual basis for a term of not less than thirty days, other than...trash removal from buildings."

D. That petitioner processed and/or removed nuclear waste generated from its customers' power plants. Processing of nuclear waste, without subsequent removal, constitutes a taxable service pursuant to Tax Law § 1105(c)(2), while removal of nuclear waste, without processing, is a taxable service in accordance with Tax Law § 1105(c)(5). Petitioner, with respect to its New York State based customers during the periods at issue herein, both processed and removed the nuclear waste. Accordingly, said combined service is considered as trash removal pursuant to Tax Law § 1105(c)(5). (Rochester Gas and Electric v. State Tax Commn., 128 AD2d 238.)

E. That in order to qualify for the exclusion provided for in Tax Law § 1101(b)(4)(i)(B), the liners in question must either become a physical component part of the processed nuclear waste or they must be actually transferred to petitioner's customers in conjunction with the performance of the taxable service. The fact that the interior walls of the liners are contaminated with radioactivity once the nuclear waste is placed therein does not support petitioner's position that said liners became a physical component part of the nuclear waste. Turning next to petitioner's argument that the liners are later actually transferred to its customers in connection with the performance of a taxable service, it must be noted that Chem-Nuclear's ultimate and primary service provided to its New York State based customers was the removal and disposal of radioactive nuclear waste. In the instant matter, petitioner's processing, removal and disposal of nuclear waste must be viewed as one integrated service, trash removal, and it cannot be found that the liners in question were ever actually transferred to its customers in connection with said service. The fact that petitioner billed its customers separately for processing services and disposal services does not lead to the conclusion that the liners were actually transferred to its customers. Assuming, *arguendo*, that two separate taxable services are provided by petitioner, i.e. processing and trash removal, it still must be shown that the liners were transferred by Chem-Nuclear to its customers upon completion of the processing service. Petitioner has failed to meet

this burden.

F. That the liners in question were tangible personal property purchased at retail by petitioner and since said liners were used by Chem-Nuclear within New York State, they are subject to the compensating use tax imposed pursuant to Tax Law § 1110.

G. That the petitions of Chem-Nuclear Systems, Inc. are denied in their entirety and the four notices of determination and demands for payment of sales and use taxes due enumerated in Finding of Fact "2", as revised by the Audit Division pursuant to Finding of Fact "3", are sustained.

DATED: Albany, New York
February 5, 1988

ADMINISTRATIVE LAW JUDGE